REMARKS

It is respectfully submitted that pursuant to M.P.E.P. §706.07(a) the final rejection is premature for at least two reasons, and that the finality of the rejection should be withdrawn.

First, the Office has included a rejection on newly-cited art (U.S. Pat. No. 6,065,017 to Barker, et al.) of claims not amended by Applicants. Second, and independently of the first reason, the final rejection is premature because it includes a rejection on prior art not of record (Barker, et al.) of claims which were amended to include limitations which should reasonably have been expected to be claimed.

As to the first reason, M.P.E.P. §706.07(a) states that "a second or any subsequent action on the merits in any application or patent undergoing re-examination proceedings will not be made final if it includes a rejection, on newly cited art . . . of any claim not amended by applicant or patent owner in spite of the fact that other claims may have been amended to require newly cited art".

This Office Action includes rejections based upon the newly-cited reference to Barker, et al. of claims that have not been amended by Applicants, including independent Claim 33 and Claims 34 – 36 which depend therefrom, as well as Claims 15 – 18, 21 – 32, 38 - 42 and 44 - 50, all of which are original non-amended claims. Thus, for at least this reason, the finality of the rejection is contrary to the M.P.E.P. and improper, and the final rejection should be withdrawn.

Secondly, M.P.E.P. §706.07(a) further states that a second or any subsequent action on the merits "should not be made final if it includes a rejection, on prior art not

of record, of any claim amended to include limitations which should reasonably have been expected to be claimed".

Applicant's Amendment of January 11, 2007 amended some of the independent claims to recite, as set forth in Claim 1, for example, that the claimed method determines the actual state of a transaction at failure, and selects an appropriate recovery action to recover from the failure based upon the actual state.

Applicants made these amendments to make explicit that which was already implicit in the claims, notwithstanding Applicants' belief that the claims as written already required a recovery action based upon the state at failure, in a *bona fide* attempt to advance the prosecution of this application. Moreover, these amendments should have been reasonably expected since the subject matter is described extensively in the specification, and, it is submitted, has been implicitly argued in response to prior Office Actions. For example, the specification expressly discloses that once a failure is detected, the state of the transaction is determined to trigger an appropriate recovery action (see, e.g., pg. 8, lns. 5-18), and describes in detail the use of "state" more generally for failure recovery at pages 18-21 and 24-30.

Thus, given the extensive description in the specification of the fault recovery functionality and the previous arguments in response to prior Office Actions, the amendments made to the claims in response to the last Office Action to include the limitations of determining actual state, it should reasonably have been expected that this would be explicitly added to the claims. Thus, the present rejections on the newly-cited reference to Barker were not necessitated by Applicants' amendments,

and the rejection should not have been made final. Accordingly, for this reason also it is requested that the finality of the present rejection be withdrawn.

Moreover, the rejection is premature because it includes new grounds of rejection of Claims 1 – 13 by combining prior art of record, i.e., Kashyap (U.S. 2002/0087912) previously cited against other claims and for a different purpose with Lin et al. (U.S. 2002/0073211) and Frolund (U.S. 6,318,617) to make a new rejection not necessitated by Applicants' amendments for the reasons stated.

Thus, in view of the foregoing, it is requested that the final rejection be withdrawn.

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Respectfully Submitted,

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